STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Judges: Donald E. Holbrook, Jr., Harold Hood and Richard Allen Griffin

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PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs-

PAUL LEWIS PHILLIPS, JR.,
Defendant-Appellee.

Supreme Court
No. 119429

Court of Appeals
No. 230811

Saginaw Circuit Court
No. 00-018277-FC

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE STATE OF MICHIGAN

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Statement of Basis of Jurisdiction

Amicus Curiae accepts Plaintiff-Appellant's Statement of Basis of Jurisdiction.

Statement of Question Presented

Statutory rules of practice, if not in conflict with any court rules, are effective until superseded by the Supreme Court's adoption of other procedural rules. The statute governing discovery mandates disclosure of defenses and MRE 705 allows the court to compel preparation of defense expert witness reports. Where, as here, the trial court ordered the defense expert witness to prepare a report, did the Court of Appeals err in reversing the trial court's order?

Trial Court Would Answer:	"Yes."
Court of Appeals Answers:	"No."
Defendant-Appellee Answers:	"No."
Plaintiff-Appellant Answers:	"Yes."
Amicus Curiae Answers:	"Yes."

Statement Of Facts

Amicus Curiae accepts the Statement of Facts contained in Plaintiff-Appellant's Application For Leave To Appeal.

Argument

Statutory rules of practice, if not in conflict with any court rules, are effective until superseded by the Supreme Court's adoption of other procedural rules. The discovery statute mandates disclosure of defenses. MCR 6.201 and MRE 705 allow the court to compel preparation of defense expert witness reports. Where, as here, the trial court ordered the defense expert witness to prepare a report, the Court of Appeals erred in reversing the trial court's order.

> "The legal concept of a criminal trial has changed considerably in modern times. It is seen less as an arena where 2 lawyer gladiators duel with the accused's fate hanging on the outcome and more as an inquiry primarily directed toward the fair ascertainment of truth."[1]

The Court of Appeals clearly erred in reversing the trial court's order compelling the defense expert witness to prepare a report. In addition to being clearly erroneous, the Court of Appeals' decision will cause material injustice because it promotes "trial by ambush," encouraging parties to have their experts forego written reports, thus avoiding disclosure and evading discovery rules.

Standard of Review: A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. In re Cornet, 422 Mich 274, 278; 373 NW2d 536 (1985). This case involves the construction of court rules. The construction of a court rule is a question of law reviewed *de novo* for error. People v Valeck, 223 Mich App 48, 50; 566 NW2d 26 (1997).

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[1] People v Thornton, 80 Mich App 746, 750; 265 NW2d 35 (1978), citing People v Johnson, 356 Mich 619, 621; 97 NW2d 739 (1959).

Preservation of Error: The Michigan Supreme Court directed the parties to brief the following issues (1) "whether MCR 6.201 or MCL 767.94a allows a trial court to compel creation of a report from a proposed defense expert witness"; (2) "whether the court rules authorize a trial court to compel disclosure of a defense"; (3) whether the court rule, MCR 6.201, or the statute, MCL 767.94a, controls discovery in a criminal case"; and (4) "whether MRE 705 gives the trial court discretion to order disclosure of a defense expert's opinion."

(1) A trial court may compel creation of a report from a proposed defense expert witness.

MCR 6.201(A)(3) requires disclosure, upon request, of any report of any kind produced by or for an expert witness whom the party intends to call at trial. MCR 6.201(I) allows court modification of the requirements and prohibitions of this discovery rule, on good cause shown. Construed together, as they should be, these rules allow the trial court to compel creation of a report from a proposed defense expert witness.

Other provisions also support this conclusion. Michigan's reciprocal discovery rule, MCR 6.201, includes the 1989 Staff Comment, which states

> Although the rules that have been developed and incorporated in this chapter are relatively comprehensive, criminal procedure is such a diverse and pervasive area of the law that ***a substantial portion of criminal procedure will continue to be regulated by statutes, the civil court rules, and case-law prescribed procedures.*** Subrules (D) and (E) provide standards for identifying what civil rule and statutory procedures will continue to be applicable. (Emphasis added by writer.)

MCR 6.001(D) states that the provisions of civil procedure apply to criminal cases, except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure. MCR 6.001(E) reads: "The rules in this chapter supersede all prior

court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.

Since statutes, civil court rules, and case-law-prescribed procedures, which are not inconsistent, continue to regulate a substantial portion of criminal procedure, it is instructive to look at these provisions.

MCR 2.302(B) states that ***parties may obtain discovery regarding any matter***, not privileged, which is relevant to the subject matter involved in the pending action, ***whether it relates to the claim or defense*** of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of discoverable matter.

The Michigan Legislature codified discovery, and MCL 760.2 delineates construction of this Code of Criminal Procedure,

> This act is hereby declared to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof.

The Legislature's use of the word "remedial" is instructive.[2] Seventy-five years ago, Michigan legislators sought to remove the evils of "trial by ambush." In 1927, they enacted the Code of Criminal Procedure to provide a remedy for overcoming discovery deficiencies.

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[2] The legislature is presumed to have intended the plain meaning of words used in a statute. Statutory language should be construed reasonably, keeping in mind the purpose of the act. When a statute does not define a term, the term will be construed according to its common and approved usage; resort to dictionary definitions is appropriate to construe undefined terms. Attorney General ex rel Dept of Natural Resources v Huron County Road Commission, 212 Mich App 510, 517; 538 NW2d 68 (1995). *Webster's New World Dictionary, 3rd College Edition*, defines "remedial" as "providing, or intended to

In People v Johnson, supra, at 621, the Court wrote that the purpose of broad discovery is to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat. The Johnson Court, at 626, subscribed to the premise that truth is best revealed by a decent opportunity to prepare in advance of trial. The Court wrote that it was "not limited to constitutional minima; rather we strive for practices which will best promote the quest for truth." Id. Writing in 1959, the Johnson Court, at 628, held,

> We are aware, of course, that appellant's claim in the instant case is founded upon no Michigan rule or statute. We believe the discretion we speak of is found in the inherent power of the trial court to control the admission of evidence so as to promote the interests of justice.

In People v Loyer, 169 Mich App 105, 135; 425 NW2d 714 (1988), Judge Terrance K. Boyle[3] concurred in part and dissented in part. Judge Boyle decried "the sporting theory of justice -- that a defendant ought to be given a fair opportunity to beat the case even if he can do this only by surprise or ambush." Judge Boyle also wrote, "Surprise, in fact, may offer a strategic or tactical advantage, but it ought not be recognized as legitimate in any enlightened system of jurisprudence." Id., at 136. Judge Boyle concluded, "In the proper case, with the issue squarely before us, I would support a trial judge's authority to require discovery from the defense with or without a statute." Id., at 126.

Judge Boyle wrote in 1988, before the advent of either MCL 767.94a or MCR 6.201. Michigan court rules (including rules of evidence), the statute, and case law address concerns regarding reciprocal discovery. When read together, as intended, these

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provide, a remedy." The word "remedy" is defined as "something that corrects, counteracts, or removes an evil or wrong."

provisions should govern discovery. Together, these provisions allow a trial court to compel creation of a report from a proposed defense expert witness.

(2) The court rules authorize a trial court to compel disclosure of a defense.

Doctrines of statutory construction should apply in determining the Supreme Court's intent in promulgating rules of practice and procedure. Mehelas v Wayne County Community College, 176 Mich App 809, 814; 440 NW2d 117 (1989). If two statutes lend themselves to a construction that avoids conflict, that construction should control. People v Holtzman, 234 Mich App 166, 175 n6; 593 NW2d 617 (1999). Similarly, a court rule should be construed so as to avoid conflict with other court rules. Id.

Thus, court rules, like legislative enactments, must be read as a whole to harmonize the meaning of their separate provisions. People v Schneider, 119 Mich App 480, 485; 326 NW2d 416 (1982). Rule provisions must be construed in such a manner as to avoid negating one another. Id., at 485-486. Court rules, like statutes, also must be construed to avoid absurd or unreasonable results. Id., at 486.

MCR 6.001(D) states that the provisions of civil procedure apply to criminal cases, except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure. MCR 6.001(E) reads: "The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter." The 1989 Staff Comment to MCR 6.001 states,

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[3] Recorder's Court judge, sitting on the Court of Appeals by assignment.

> Although the rules that have been developed and incorporated in this chapter are relatively comprehensive, criminal procedure is such a diverse and pervasive area of the law that ***a substantial portion of criminal procedure will continue to be regulated by statutes, the civil court rules, and case-law prescribed procedures.*** Subrules (D) and (E) provide standards for identifying what civil rule and statutory procedures will continue to be applicable. (Emphasis added by writer.)

MCR 2.302(B) states that ***parties may obtain discovery regarding any matter***, not privileged, which is relevant to the subject matter involved in the pending action, ***whether it relates to the claim or defense of another party***, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of discoverable matter. This rule is not inconsistent with the rules governing reciprocal discovery in a criminal case. Thus, the court rules, when read together as intended, authorize a trial court to compel disclosure of a defense.

(3) Where they are not inconsistent, the court rule, MCR 6.201, and the statute, MCL 767.94a, both govern discovery in a criminal case.

Ordinarily, the court rules established by the Supreme Court take precedence over inconsistent legislation in matters of practice and procedure. People v Langham, 101 Mich App 391, 397; 300 NW2d 572 (1980). In People v Sheldon, 234 Mich App 68, 70-71; 592 NW2d 121 (1999), the panel held that discovery in criminal cases heard in Michigan courts is governed by MCR 6.201 and not by MCL 767.94a.

However, because MCL 767.94a is based on substantial policy considerations, McDougall v Schanz[4] applies. In McDougall v Schanz, at 27, this Court held that it is not authorized by Michigan's Constitution to enact court rules that establish, abrogate, or

[4] 461 Mich 15; 597 NW2d 148 (1999).

modify the substantive law. Const 1963, Art 6, § 5. Instead, this Court's rule-making authority extends only to matters of practice and procedure.

In McDougall v Schanz, at 29, this Court held that a statutory evidentiary rule restricting the admissibility of expert opinions in certain medical malpractice cases did not impermissibly infringe on the Supreme Court's constitutional rulemaking authority over practice and procedure, even though the statute directly conflicted with a court rule of evidence. This Court concluded that the statute was an enactment of substantive law, reflecting "wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists." Id., at 35.

Therefore, the statute, not the court rule, governed. Moreover, the McDougall Court, at 29, overruled Perin v Peuler (On Rehearing), 373 Mich 531; 130 NW2d 4 (1964) for exceeding the Supreme Court's rule-making authority:

> [W]e now recognize that the *Perin* Court failed to consider the constitutionally required distinction between "practice and procedure" and substantive law and thus overstated the reach of our rule-making authority.

MCR 1.104 reads: "Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."

Rule 6.001 governs the general provisions of criminal procedure. MCR 6.001(E) reads: "The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter."

Rule 6.201 governing mandatory disclosure is not inconsistent with MCL 767.94a. However, MCL 6.201(A) does read: "In addition to disclosures required by

provisions of law ***other than MCL 767.94a***, . . . a party upon request must provide all other parties . . . ."

Under MCL 767.94a(1)(b), a defendant or his attorney shall disclose to the prosecuting attorney upon request the nature of any defense the defendant intends to establish at trial by expert testimony. Under MCL 767.94a(1)(c), a defendant or her attorney shall disclose to the prosecuting attorney upon request any report or statement by an expert. Such report may involve a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence.

Court rules, like statutes, must be construed to avoid absurd or unreasonable results. If the defense can avoid reasonable discovery requests by instructing expert witnesses to forego putting their opinions in writing, the policy behind reciprocal discovery will be substantially undermined.

There is sound public policy behind MCL 767.94a. Michigan courts do not condone trial by ambush or surprise. If left undisturbed, the Court of Appeals' decision in Phillips[5] would encourage parties to have their experts forego written reports to avoid disclosure and evade discovery rules.

In People v Lover, supra, Judge Boyle wrote, "the articulation of the disadvantage suffered by defendant, the loss of his right to trial by ambush or surprise, is a curious interpretation of equal protection at best and a perverse interpretation at worst." Id., 126.

Judge Boyle wrote before the advent of MCL 767.94a or MCR 6.201. Based on a misplaced belief that the Legislature had encroached on its rule-making authority, this Court promulgated Administrative Order 1994-10, which reads:

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[5] People v Phillips, 246 Mich App 201; 632 NW2d 154 (2001).

> On May 4, 1994, the Governor signed House Bill 4227, concerning discovery by the prosecution of certain information known to the defendant in a criminal case. 1994 PA 113, MCL 767.94a; MSA 28.1023(194a). On November 16, 1994, this Court promulgated MCR 6.201, which is a comprehensive treatment of the subject of discovery in criminal cases.
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> On order of the Court, effective January 1, 1995, discovery in criminal cases heard in the courts of this state is governed by MCR 6.201 and not by MCL 767.94a; MSA 28.1023(194a). Const 1963, art 6, § 5; MCR 1.104.

Recently, in People v Glass, 464 Mich 266, 271; 627 NW2d 261 (2001), this Court held that it exceeded its criminal procedure rulemaking authority by creating a substantive right to a preliminary examination for grand jury indictees. Similarly, because MCL 767.94a is based on substantial policy considerations, the Supreme Court exceeded its authority when it issued Administrative Order 1994-10. The court rule and statute can and should be harmonized with each other.

(4) MRE 705 gives the trial court discretion to order disclosure of a defense expert's opinion.

The Court of Appeals' decision in Phillips is wrong because Michigan rules of evidence provide that trial courts may require disclosure of information underlying an expert's opinion prior to his testimony. Specifically, MRE 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, ***unless the court requires otherwise***. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (Emphasis added by writer.)

The plain language of this evidentiary rule allows the trial court to require expert witnesses to make prior disclosure of facts or data underlying their testimony.

Interpretation of a court rule is subject to the same basic principles that govern statutory interpretation. People v Robbins, 233 Mich App 355, 360; 566 NW2d 49

(1997). In construing a rule of evidence, words are to be given their ordinary meanings. People v Johnson, 100 Mich App 594, 598; 300 NW2d 332 (1980). Courts should avoid any construction that would render a court rule, or any part of it, surplusage or nugatory. In re Neubeck, 223 Mich App 568, 572-573; 567 NW2d 689 (1997).

Consisting of judges Holbrook, Hood, and Griffin, the Phillips panel held: "There is no requirement for an expert to actually create a physical report, and an expert may testify based solely on observations obtained at trial. MRE 703; *Webb, supra* at 277."[6] The Phillips panel is wrong because MRE 705 gives trial judges the authority to require experts to create a physical report.

Public Policy Considerations

Public policy considerations dovetail with the plain language of MRE 705. Michigan courts do not condone trial by ambush or surprise. If left undisturbed, the Court of Appeals' decision in Phillips would encourage parties to have their experts forego written reports to avoid disclosure and evade discovery rules.

In People v Loyer, supra, Judge Boyle wrote, "the articulation of the disadvantage suffered by defendant, the loss of his right to trial by ambush or surprise, is a curious interpretation of equal protection at best and a perverse interpretation at worst. In the proper case, with the issue squarely before us, I would support a trial judge's authority to require discovery from the defense with or without a statute." Id., 126.

The issue of the trial judge's authority to require the defense to comply with discovery is squarely before this Court. However, there is a rule of evidence supporting

[6] People v Phillips, supra, at 202.

the trial court's authority to require experts to create physical reports. This Court must correct the appellate panel's clear error in Phillips.

***Lemcool (After Remand)* Applied**

In another interlocutory appeal, this Court noted that "Michigan recognizes the broad power of the trial court to prevent ambush and surprise through the use of discovery." People v Lemcool (After Remand), 445 Mich 491, 498 n53; 518 NW2d 437 (1994). Lemcool, (After Remand) involved a drug case. After the prosecutor disclosed names of witnesses he intended to call at trial and provided a copy of the lab report, the circuit court ordered defendants to disclose their witnesses and list any physical evidence they planned to introduce.[7]

In Lemcool, the Court of Appeals held that, "in the absence of specific authority [from a statute or court rule], the better policy is for trial courts to exercise judicial restraint and refuse to permit such prosecutorial discovery in light of potential and far-reaching effects on fundamental constitutional principles and rights."[8] Writing in dissent, Judge McKenzie noted past Court of Appeals decisions that recognized the trial courts' "inherent discretionary power" to grant the prosecution discovery despite the absence of specific authorization by statute or court rule.[9]

In reversing the Court of Appeals majority, the Supreme Court wrote: "We have long entrusted the question of discovery in criminal cases to the discretion of the trial court."[10] The Supreme Court noted extensive efforts to formalize satisfactory rules of discovery in criminal cases: "Proposed MCR 6.205 would have treated disclosure of

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[7] Lemcool, (After Remand), supra, 492.
[8] Id., 495.
[9] Id., 496.

information known to the defense."[11] However, the Supreme Court wrote, "[a]fter lengthy discussions, we decided not to adopt proposed Subchapter 6.200. Rather than promulgate a set of fixed rules, we were persuaded to allow some further development of this area through the resolution of appellate cases."[12] To date, proposed MCR 6.205, treating disclosure of information known to the defense, has not been adopted.

The Supreme Court cited an example of this case-by-case approach in People v VanderVliet, 444 Mich 52, 89; 508 NW2d 114 (1993).[13] In VanderVliet, the Supreme Court held that, to aid in resolving issues concerning "other acts" evidence under MRE 404(b), a trial judge may require disclosure of the defendant's theory or theories of defense.[14] Quoting VanderVliet, the Supreme Court wrote: "These considerations underscore the wisdom of embracing an approach to discovery, undertaken by many state courts and the federal judiciary, which promotes reliable decision making."[15] The VanderVliet Court noted that "A notice requirement prevents unfair surprise and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice."[16]

It is obvious from Lemcool (After Remand) that MCR 6.201 was not intended as a comprehensive, inflexible rule of discovery. Moreover, the plain language of the rule confirms that point. Subsection (I) of MCR 6.201 says that a judge may modify the rule. Michigan's discovery rules are still evolving, and this Court's decision in Phillips will be

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[10] Id., 497.
[11] Id.
[12] Id.
[13] Id., 497-498.
[14] Id., 498.
[15] Id., 498.
[16] Id.

an important link in that evolutionary chain.[17] Historically, the trial courts have enjoyed broad discretion concerning questions of discovery in criminal cases. If left undisturbed, the Court of Appeals' published decision in this case would unnecessarily and unjustifiably limit the trial court's discretion.

***People v Elston* Distinguished**

Additionally, the Phillips panel misplaced its reliance on People v Elston, 462 Mich 751; 614 NW2d 595 (2000). In Phillips, at 202-203, the appellate panel wrote:

> The Supreme Court has determined that an expert witness' nonwritten observations and conclusions are not discoverable. *People v Elston*, 462 Mich 751, 759, 762; 614 NW2d 595 (2000). Further, this Court has previously determined that only statements actually written and adopted by lay witnesses are disclosable. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Therefore, the prosecutor was not entitled to the unwritten observations of defendant's expert witnesses, and the trial court erred in construing MCR 6.201."

If a trial judge orders a party to have its expert prepare a physical report pursuant to MRE 705, that physical report is discoverable. The expert witness's nonwritten observations and conclusions are reduced to writing, and they become discoverable.

The Supreme Court's ruling in Elston is distinguishable. In Elston, a doctor informed the prosecutor on the morning of the first day of defendant's two-day trial that he had observed sperm fragments recovered from the rape victim. Elston, supra, 757. As soon as the prosecutor learned of the doctor's observations of sperm, he immediately informed defense counsel. Until the doctor's disclosure, neither party knew of any evidence indicating the presence of sperm. Id.

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[17] Twenty-four years ago, the Court of Appeals wrote: "There are signs that we may be approaching a rule of complete discovery in criminal cases -- at least discovery of materials held by the prosecution." People v Thornton, 80 Mich App 746, 750; 265 NW2d 35 (1978). However, reciprocal discovery appears to be the modern trend.

The situation in Elston was very different from that found in Phillips. In Elston, neither party knew about the doctor's observations until the morning of the first day of defendant's trial. Thus, withholding the doctor's observations in Elston was inadvertent and unintentional and this Court's opinion reflects that situation. In Phillips, defense counsel repeatedly committed discovery violations, and that recalcitrance caused the trial court to order defense counsel to provide basic reports and information on his expert witnesses.

In Elston, supra, 762, the Supreme Court held that the doctor's own personal observations were outside the scope of discovery, specifically MCR 6.201(A)(3). This court rule provides for mandatory disclosure of "any report of any kind produced by or for an expert witness whom the party intends to call at trial." But, this Court did not rule that the trial judge would have been powerless to compel the doctor to prepare a report, had anyone been aware of his observation of sperm evidence. In Phillips, the trial judge ordered the defense expert to prepare a report. Such an order is permissible under MRE 705. Once the report is prepared, it becomes subject to mandatory disclosure under MCR 6.201(A)(3).

***Clifford v United States* Is Instructive**

In Clifford v United States, 532 A2d 628, 631 (1987), the District of Columbia Court of Appeals considered the case of a defendant convicted by jury of assault with intent to commit a sexual act. Defendant claimed he ate a "spiked" candy bar that he bought from a co-worker, and this involuntary intoxication caused his anti-social behavior. Id., 630-631. The trial court forbade Clifford's expert witness from testifying. Defendant argued he was erroneously deprived of a doctor's expert opinion that he was

probably under the influence of drugs. The District of Columbia Court of Appeals affirmed, concluding that the trial court did not abuse its discretion because defense counsel refused to produce, for examination by government counsel, the test protocols on which the doctor, in part, based his opinion. Id., 631-632.

The Clifford Court wrote that Rule 705 was adopted as a response to criticism to laying a foundation for expert testimony by using hypothetical questions. This method had been criticized as unrealistic, inefficient, and subject to abuse through the crafting of highly biased hypothetical questions. Id., 632-633. The Clifford Court, at 633, wrote:

> "The aim of Rule 705 is to replace the need for hypotheticals with reliance on cross-examination to bring out the basis of an expert's testimony. Use of the adversary process should allow the opposing attorneys to explore an expert's reasoning more selectively and, hence, more efficiently, while reducing the opportunities for deceptive manipulation of the testimony."

The Clifford Court went on to hold:

> "Two elements of Rule 705 are essential to achieving these ends: first, the party presenting expert testimony can elect not to disclose some or all of the facts underlying the opinion evidence; but, second, the court may compel disclosure of the entire basis before the witness testifies, and, in any event, the opponent can elicit the basis during cross-examination." Id., 633.

The need to permit a criminal defendant the means to expose the basis of expert evidence against him is particularly strong. Id., 633-634. The introduction of expert testimony with no basis could be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial. Id., 634. Conversely, the Clifford Court acknowledged:

> "Rational use of expert evidence in the courtroom, however, demands that defense testimony be equally open to scrutiny by the government." Id., 634.

The District of Columbia Court of Appeals adopted the provision of Rule 705 under which the trial court may order that a party proffering expert testimony turn over for inspection by the opponent any report or document on which the expert relied in forming the opinion to which he or she will testify. Id., at 635. The Clifford Court, at 635, also held:

> "The decision whether to order production of the documentary basis for an expert opinion is discretionary with the court but should be readily exercised to ensure that each side receives sufficient information to conduct effective cross-examination."

The expressed purpose of Michigan's rules of evidence is to secure fairness in administration, eliminate unjustifiable expense and delay, and promote growth and development of the law of evidence so that truth may be ascertained and proceedings justly determined. MRE 102. Trial by combat, ambush, and surprise will return to Michigan courtrooms if this Court allows the Phillips panel's published decision to stand. Left unchallenged, the Phillips holding will result in a 20-year setback for Michigan jurisprudence.

Relief Requested

Amicus respectfully asks this Honorable Court to **reverse** the decision of the Court of Appeals and uphold the decision of the trial court to require the defense in this case to provide a basic report and vitae from the defendant's expert witness.

Respectfully Submitted,

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Dated: September 24, 2002

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